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HAROLD B. WILLEY, C

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

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No. 106

STAPLING MACHINES CO.,

Appellant,

vs.

A. H. STONE, CHAIRMAN, STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI AND J. E. STONE, GENERAL COUNSEL FOR THE STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

STATEMENT AS TO JURISDICTION

BERNARD LEONARD TIGHE, JR.,
Counsel for Appellant.

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

No. 38,949

A. H. STONE, Chairman State Tax Commission

vs.

STAPLING MACHINES CO.

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States as amended, plaintiff-appellant submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the Judgment of the Supreme Court of the State of Mississippi entered in this cause.

Opinion Below

The opinion of the Supreme Court of the State of Mississippi, which is the highest Court of this State, indicates that said Court has decided a Federal question of substance in a way not in accord with applicable decisions of this Court. S. Ct. Rule 38,5(a). The Supreme Court of Mississippi has decided that an undomesticated foreign corporation engaged in business exclusively in interstate commerce must pay Mississippi a tax for the privilege of engaging in such commerce. A copy of the opinion of the Supreme Court of Mississippi is hereto attached as Appendix "A" to this statement.

Jurisdiction

The Judgment of the Supreme Court of the State of Mississippi was entered on March 22, 1954, the plaintiff-apellant's suggestion of error was overruled April 19, 1954, a petition for appeal to the Supreme Court of the United States presented to the presiding Justice of the Supreme Court of the State of Mississippi, on the *11th* day of May, 1954. The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is confirmed by Title 28, United States Code, Section 1257 (a).

The following decisions sustain jurisdiction of the Supreme Court of the United States to review the judgment on direct appeal in this case:

Nippert v. *City of Richmond*, 327 U. S. 416, 90 L. Ed. 760;

Davis v. *Virginia*, 236 U. S. 697, 59 L. Ed. 795;

Caldwell v. *State of North Carolina*, 187 U. S. 622, 47 L. Ed. 336;

Dozier v. *State of Alabama*, 218 U. S. 124, 54 L. Ed. 965;

Craig v. *Mills*, 33 So. (2d) 801, 203 Miss. 692;

Crutcher v. *Kentucky* (1891), 141 U. S. 47, 35 L. Ed. 649;

Webber v. *Virginia* (1880), 103 U. S. 344, 26 L. Ed. 565;

Robbins v. *Tax District of Shelby County (Tenn.)*, 120 U. S. 489, 30 L. Ed. 964;

William G. Asher v. *State of Texas*, 128 U. S. 129, 32 L. Ed. 368;

International Textbook Co. v. *Pigg*, 217 U. S. 91, 54 L. L. Ed. 678;

Memphis Steam Laundry Cleaners, Inc. v. *A. H. Stone, Chairman State Tax Commission*, S. Ct. 96 L. Ed. 437.

The Precise Questions Involved

The questions involved in this case and presented to the Court for its decision are as to whether or not Chapter 119, Laws of 1934, as amended, Mississippi Code of 1942, Chapter 3, Sections 10,105, 10,111, 10,115, 10,120, and 10,123 violate Paragraph 3, Section 8, of the Constitution of the United States providing that Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian Tribes, and as to whether or not such paragraphs Violate Section (1) of the 14th Amendment to the Constitution of the United States providing that no state shall deprive any person of life, liberty and property without due process of law nor deny to any person within its jurisdiction the equal protection of the law.

The Supreme Court of Mississippi held that the sections were valid and did not violate either the commerce clause or the 14th Amendment to the Constitution of the United States. The Federal question in this cause was properly, timely and fully raised by Stapling Machines Co. and squarely passed upon by the Mississippi Supreme Court.

THE QUESTIONS INVOLVED ARE SUBSTANTIAL

Statement

The facts in the case appear from the pleadings and testimony and are undisputed (R. 2). The appellant's declaration alleged that it was a foreign corporation organized under the laws of the State of Delaware but whose domicile and principal place of business and all offices and officers are located in Rockaway, New Jersey, and that it was engaged in licensing patented machines and patents covering different types of boxes made by said machines, and which patents are made the subject to license agreements with

licensees in the State of Mississippi. That it has no offices, officers, agents, employees, representatives, and no place of business located in the State of Mississippi. That all license agreements are executed in the State of New Jersey, where patented machines are delivered to the licensee f. o. b. Rockaway, New Jersey, after having been paid the sum of 105 percent of the cost.

The State Tax Commission has attempted to impose a privilege tax as a condition precedent to entering into the license agreements with licensees in the State of Mississippi, and has cited the Stapling Machines Co. to appear and show cause why it should not be required to pay the privilege taxes imposed by Chapter 119, Laws of 1934, as amended, Mississippi Code of 1942, Chapter 3, Sections 10,105, 10,111, 10,115, 10,120 and 10,123 (R. 8). Appendix "C".

The tax is 2 percent of the gross dollars received from the aforesaid license agreements.

Appellant filed with the State Tax Commission a comprehensive statement of the nature and scope of its business in Mississippi and alleged that the imposition of the tax violates constitutional immunities in that the State had no jurisdiction to tax the income from the intangible patent rights, as they had no business situs within the state and also the state's statutory definition of "doing business" could not confer such jurisdiction; that its activities were wholly and completely in interstate commerce and therefore not subject to privilege taxation by the state. The Commission disagreed with appellant and entered an order sustaining the tax liability (R. 9).

Appellant appealed to the Circuit Court of the First Judicial District of Hinds County, Mississippi, raising these questions by its pleadings (R. 6). The Circuit Court reversed the Tax Commission and held appellant not liable for the taxes, on the ground, as stated in the opinion, that:

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"From the pleadings and the admission contained therein it appears to me that the entire transaction is in Interstate Commerce. * * * This defense of the transaction, being violative of Commerce Clause of the United States Constitution, is a total defense, and if good, would, of course, bar the tax and warrant the recovery" (R. 69-70). Appendix "B".

The Supreme Court of Mississippi reversed the Circuit Court and entered a final judgment dismissing appellant's suit and the amount sued for for the years 1949 and 1950.

The Supreme Court of Mississippi summarized in its opinion the undisputed facts, as follows:

"The appellant contends that the tax here collected was two per cent of the gross income of appellee from its business of renting or leasing tangible personal property in the state. On the contrary, the appellee contends that the income in question did not arise from rents, but was royalty, and, as such, was not taxable. The decision of this controversy also involves a consideration of what constitutes doing business, the situs of property for taxation, and the commerce clause of the federal constitution.

"The appellee is a Delaware corporation, having a place of business in Rockaway, New Jersey. It leased, under a written contract, to certain persons in the State of Mississippi, delivered f. o. b. the place of manufacture, at the cost of production, certain box making machines on which it held U. S. patents. The lessees thereunder acquired no property rights other than the right to use. The company agreed to furnish repair parts. Its agents were granted access to the machines for inspection and sketching. It had no office or agent in the state. The obligations of the lessees were payable at its principal place of business; and the lessees were required to keep accurate records, separate and apart, and subject to examination by the company's agents who had the right to make copies. The lessees

were also required to report in writing to the company the number of boxes delivered during the past month, to whom sold, and the gross amount thereof.

"Under Section 1 of the lease contract, the lessee had 'the right and license (a) to make on Lessor's machines in the factory of Lessee at —— boxes covered by any one or more of the patents listed in Exhibit A; (b) to use in said factory, for the manufacture of boxes, machines leased hereunder from Lessor; (c) to use in said factory, for the manufacture of boxes on Lessor's machines, the method inventions covered by any one or more of said patents; and (d) to sell in the United States boxes made under this agreement.

"Thus it will be seen that the lessees had the right to use the patented machines, to make patented boxes thereon, to use the method inventions covered by the patents, and to sell the boxes in the United States."

Appellant contends, and it is not disputed, that under the license agreement licensee has paid all ad valorem taxes due on the machines.

The Supreme Court of Mississippi held that:

"In other words, the statute defined 'doing business', the corporation operated within that definition, and it was liable for the tax. * * * The terms of the contract can be enforced under the laws of this State. A violation thereof can make the lessee amenable to the process of the state courts. Hence the tax is imposed in return for protection by the state."

In other words, the Supreme Court of Mississippi held that appellant must pay a privilege tax for the privilege of owning patented machines and patents for the manufacture of boxes, which patents are made the subject of a license agreement in its office in New Jersey. Undoubtedly, appellant is engaging in Mississippi in interstate commerce, and an undomesticated foreign corporation has the right to en-

gage in Mississippi in interstate commerce without obtaining a license or without paying for the privilege, as this privilege flows from the commerce clause of the Federal Constitution. *Spector Motor Service, Inc.* v. *O'Connor*, 71 S. Ct. 508, 95 L. Ed. 573, 340 U. S. 609-10; *Memphis Steam Laundry* v. *Stone*, 96 L. Ed. 364, 72 S. Ct. 424; *Michigan-Wisconsin Pipe Line Company* v. *Calvert*, 74 S. Ct. 396; *Trunk Line Gas Co.* v. *Coleman, Advance Sheets*, 98 L. Ed. 42, Case No. 179.

It is respectfully submitted that the questions presented by your appellant are substantial and of public importance; that the judgment rendered by the Supreme Court of Mississippi appealed from should be reversed.

BERNARD LEONARD TIGHE, JR.,
Counsel for Appellant.

APPENDIX "A"

IN THE SUPREME COURT OF MISSISSIPPI

No. 38,949

(Opinion Rendered March 22, 1954)

A. H. STONE, Chairman, State Tax Commission

vs.

STAPLING MACHINES COMPANY

LEE, *Justice:*

A. H. Stone, Sales Tax Commissioner, made demand, under Section 10111, Code of 1942, upon Stapling Machines Company for the payment of a sales tax of two per cent on the gross income of its business for a two year period. It amounted to $4,713.33 for 1949 and $7,017.09 for 1950, or a total of $11,730.42. The company protested the assessment. After a full hearing before the State Tax Commission, it was affirmed. The tax was then paid, and subsequently, the Company filed its suit in the Circuit Court of Hinds County to recover the amount paid. The circuit judge, sitting as both judge and jury, found for the plaintiff, and from the judgment entered, the Tax Commissioner appealed.

The material part of Section 10111, supra, is as follows: "(1) Upon every person engaging or continuing within this state in any of the following businesses, there is likewise hereby levied and shall be collected a tax on account of the business engaged in equal to two per cent of the gross income of the business: * * * Renting or leasing of tangible personal property * * *."

The appellant contends that the tax here collected was two per cent of the gross income of appellee from its business of renting or leasing tangible personal property in the state. On the contrary, the appellee contends that the income in question did not arise from rents, but was royalty, and, as such, was not taxable. The decision of this controversy also involves a consideration of what constitutes

doing business, the situs of property for taxation, and the commerce clause of the federal constitution.

The appellee is a Delaware corporation, having a place of business in Rockaway, New Jersey. It leased, under a written contract, to certain persons in the State of Mississippi, delivered f. o. b. the place of manufacture, at the cost of production, certain box making machines on which it held U. S. patents. The lessees thereunder acquired no property rights other than the right to use. The company agreed to furnish repair parts. Its agents were granted access to the machines for inspection and sketching. It had no office or agent in the state. The obligations of the lessees were payable at its principal place of business; and the lessees were required to keep accurate records, separate and apart, and subject to examination by the company's agents who had the right to make copies. The lessees were also required to report in writing to the company the number of boxes delivered during the past month, to whom sold, and the gross amount thereof.

Under Section 1 of the lease contract, the lessee had "the right and license (a) to make on Lessor's machines in the factory of Lessee at ——— boxes covered by any one or more of the patents listed in Exhibit A; (b) to use in said factory, for the manufacture of boxes, machines leased hereunder from Lessor; (c) to use in said factory, for the manufacture of boxes on Lessor's machines, the method inventions covered by any one or more of said patents; and (d) to sell in the United States boxes made under this agreement."

Thus it will be seen that the lessees had the right to use the patented machines, to make patented boxes thereon, to use the method inventions covered by the patents, and to sell the boxes in the United States.

The applicable part of Section 3 of the lease contract, now under consideration, is as follows: "Lessee agrees to pay to Lessor, in addition to the amounts hereinbefore provided to be paid by Lessee for the initial right to possess the machines leased hereunder, (a) sums of money equal to four per cent (4%) *of the gross sales* or fair market value, whichever is higher, *of all 'Rock Fastener', 'All-Bound' and*

'James' boxes made under this agreement, and (b) sums of money equal to two per cent (*2%*) *of the gross sales* or fair market value, whichever is higher, *of all other boxes* made under this agreement; *and Lessee agrees to pay such sums as a royalty for the use of any or all of the patented inventions hereunder licensed to be used and/or as a rental for the use of any or all machines leased hereunder;* * * *". (Emphasis Supplied.)

Under the above provision, lessees had to pay the cost of production of the machines, four per cent (4%) of the gross sales of the patented boxes, and two per cent (2%) of the gross sales of all other boxes.

It is clear that the company rented its machines to the lessees in New Jersey with the understanding that they would be operated in Mississippi. Pursuant thereto, these machines were carried to Mississippi, but they remained the property of the company. The Lessees were required to pay two per cent of the value of any box made on one of the machines. Clearly such two per cent (2%) was an additional rental for the use of the patented machines. But, since four per cent (4%) of the value had to be paid, if a patented box was made on the machines, in reason it follows that the difference between four per cent (4%) on the patented boxes and two per cent (2%) on any other box, that is, two per cent (2%), constituted royalty, that is, compensation for the use of the patent.

Notice the very significant language in Section 3 of the lease contract: "* * * and Lessee agrees to pay such sums as a royalty for the use of any or all of the patented inventions hereunder licensed to be used and/or as a rental for the use of any or all machines leased hereunder; * * *." Those words provide for the payment of both royalty and rental. The above conclusion, therefore, seems inescapable.

In such view 69 C. J. S., Patents, Section 256a, page 792, becomes helpful. It is as follows: *"The word 'royalty', when used in connection with a license under a patent, means the compensation paid by the licensee to the licensor for the use of the licensor's patented invention.* It has been defined as a tax or duty paid to the owner of a patent for the privilege of manufacturing or using the patented article;

rental; payment proportionate to the use of the patented device; something proportionate to the use of the patented device, or, other words, a kind of excise; specific sums paid annually, or at other stated period, for the right to use a patented device, whether it is used much or little or not at all. The word has been held an appropriate term as applied to improvements which are nonpatentable.

"*The word 'rental' used with reference to patented devices has been said ordinarily to mean specific sums paid annually or at other stated period for the right to use a patented device; and in this connection it has been distinguished from 'royalties'.*" (Emphasis supplied). Western Union Tel. Co. v. American Bell Tel. Co., (Mass.) 125 Fed. 342, 60 CCA 220, is cited. See Hubenthal v. Kennedy, 76 Iowa 707, 39 N.W. 694; Volk v. Volk Manufacturing Co., 101 Conn. 554, 126 Atl. 8847.

This court has said that rent is compensation for the use of property. Hines Motor Co., Inc. v. Hederman, 201 Miss. 859, 30 So. 2d 70; Stovall v. Gardner, 203 Miss. 527, 36 So. 2d 163.

Paragraph (12) Section 10104, Code of 1942, provides that the term "business", when used in the Act, "shall include all activities or acts engaged in (personal or corporate) or caused to be engaged in with the object of gain, benefit or advantage either direct or indirect, and not exempting subactivities producing marketable commodities used or consumed in the main business activity each of such subactivities shall be considered business engaged in, taxable in the class in which it falls."

In Kantor & Son v. Stone, 203 Miss. 260, 34 So. 2d 492, the appellant contended that they were engaged in the business of general contractor, for which they had paid all taxes due, although as an incident thereto and as a business expediency, they made the ten sales of tangible property there in question. The Court held that the tax, which was imposed by Section 10108, Code of 1942, was due by reason of the "business" which was defined in Section 10104 thereof. The opinion said: "It requires no argument to demonstrate that by buying and selling this real property the appellants were engaged in business under this statute, but they say that

this was not their main business but was only incidental thereto. The mere fact that one business is an incident of another does not relieve it from taxation under this statute, it may nor may not, depending upon its character and purpose. A person may be engaged in more than one business, each of which is taxable under this statute."

In Stone v. General Contract Purchase Corp., 193 Miss. 301, 7 So. 2d 806, where a Missouri Corporation, with an office in Memphis, Tennessee, acquired, from automobile dealers, notes which were secured by liens on automobiles, and the corporation's agents came into the state to collect the notes and enforce liens, it was held that the corporation was "doing business" in the state so as to require it to pay the state privilege tax imposed by Chapter 110, Laws of 1940. In answer to the contention that the corporation did no business in the state as to such notes, the opinion said: "Acquiring these notes was one of the things necessary to be done in the prosecution of the appellee's business, but it was not the only one, for they must either be sold or collected, and when necessary the liens securing their payment must be enforced. All of the things necessary for the prosecution of a business need not take place within the state imposing a privilege tax thereon before the tax can be exacted. All that is necessary is that something be done to take place within the taxing state that is incident to or substantially connected with the prosecution of the business. State of Wisconsin v. J. C. Penney Co., 311 U. S. 435, 61 S. Ct. 246, 85 L. Ed. 267, 130 A. L. R. 1229. Neither the common law definition of what constitutes doing business nor that of former decisions of this court control here, for the legislature, as it had a right to do (Mathison v. Brister, 166 Miss. 67, 145 So. 358; 59 C. J. 1036), has set forth in the statute what is meant by the words 'doing business' and 'doing a business' * * *."

In other words, the statute defined "doing business", the corporation operated within that definition, and it was liable for the tax. It was pointed out that the liens were protected by the laws of the State, without which they would be of little value, and that the tax was exacted in return for something substantial, which the State had given. On

this point, the opinion cited State of Wisconsin v. J. C. Penney Co., supra. The proof in the case before us did not show that the Stapling Machines Company had ever sent any of its agents into the state in connection with these machines, but it had the right of access to inspect and sketch them. Besides, by another provision of the contract, it was stated: "Lessee agrees that it will not (a) encumber, sublet, or sub-license any machine leased under this agreement; (b) allow any such machine to be removed from its possession either upon any writ of attachment or in satisfaction of any execution, judgment, or decree, or on distraint for rent; or (c) allow any other person or party to use any such machines."

The terms of the contract can be enforced under the laws of this State. A violation thereof can make the lessees amenable to the process of the state courts. Hence, the tax is imposed in return for protection by the state. See Pergl v. U. S. Axle Co., 50 N. E. 2d. 115; Village of Axtell v. Nebraska Hardware Municipal Ins. Co., 7 N. W. 2d. 471; Cincinnati, Ohio, v. Commonwealth, ex rel., 292 Ky. 597, 167 S. W. 2d. 709.

But, if the appellee is not liable for this tax, it will pay nothing at all for this protection, because under its contract, the lessees pay the ad valorem taxes on the machines.

The machines were located in the state, and under the philosophy announced in Stone v. General Contract Purchase Corp., supra, the State may collect this tax. See also International Harvester Co. v. Wisconsin Dept. of Taxation, 322 U. S. 435, 88 L. Ed. 1373, where it was said: "A state may tax such part of the income of a non-resident as is fairly attributable either to property located in the state or to events or transactions which, occurring there, are subject to state regulation and which are within the protection of the state and entitled to the numerous other benefits which it confers."

The machines have obtained a business situs apart from the domicile of their owner, as they may do. In New York, Ex rel v. Graves, 299 U. S. 366, 81 L. Ed. 285, there was involved the constitutionality of a tax imposed by the State of New York upon profits realized by a non-resident upon

the sale of a membership in the New York Stock Exchange. It was argued that the membership was intangible personal property, that property of that sort is taxable only at the domicile of the owner, and that unless the membership had a "business situs" in New York, it was not taxable there. In answer to this argument, the Court said: "When we speak of a 'business situs' of intangible property in the taxing State we are indulging in a metaphor. We express the idea of localization by virtue of the attributes of the intangible right in relation to the conduct of affairs at a particular place. The right may grow out of the actual transactions of a localized business *or the right may be identified with a particular place because the exercise of the right is fixed exclusively or dominantly at that place. In the latter case the localization for the purpose of transacting business may constitute a business situs quite as clearly as the conduct of the business itself.*" (Emphasis supplied.)

Where the situs of the intangibles is confined to the domicile of the owner, they are of course taxed at his domicile. "But when the taxpayer extends his activities with respect to his intangibles, so as to avail himself of the protection and benefit of the laws of another state, in such a way as to bring his person or property within the reach of the tax gatherer there, the reason for a single place of taxation no longer obtains, and the rule is not even a workable substitute for the reasons which may exist in any particular case to support the constitutional power of each state concerned to tax." Curry v. McCanless, 307 U. S. 357, 83 L. Ed. 1339. See also Kelly v. Bastedo, 70 Ariz. 371, 220 P. 2d 1069; State v. Atlantic Oil Producing Co., 49 P. 2d. 534; Grieves v. State, ex rel, 35 P. 2d. 454.

When the machines came to rest in this state for the purpose of manufacturing patented and unpatented boxes, the use or rent thereof became localized, and they left the stream of interstate commerce. In McGoldrick v. Berwind White Coal Min. Co., 309 J. W. 33, 84 L. Ed. 565, the Court said: "But it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens, merely because an incidental or

consequential effect of the tax is an increase in the cost of doing the business, Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 254, 82 L. Ed. 823, 826, 58 S. Ct. 546, 115 A. L. R. 944. Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which nevertheless fall short of the regulation of the commerce which the Constitution leaves to Congress.

Spector Motor Service, Inc. v. O'Connor, Tax. Comm., 304 U. S. 602, 95 L. Ed. 573, under the construction now being made, is not in point because the tax there levied was directly on the right to engage in interstate commerce, inasmuch as the goods were still in the stream of such commerce, when they reached the docks of the bus company.

Likewise, Coleman, Attorney General v. Truckline Gas Co. (Miss.) 63 So. 2d 73, is not in point, because there a special privilege tax was levied upon gas pipeline companies, which were engaged solely in interstate operations, and for that reason, it was held that the tax levied was a violation of the commerce clause of the federal constitution.

The efficacy of Houston Canning Co. v. Virginia Can. Co., 211 Ala. 232, 100 So. 104, strongly relied on by the appellee, is somewhat impaired by a subsequent decision of that Court in Cadden-Allen v. Trans-Lux News Sign Corp., 48 So. 2d 428, wherein the court commented that "the decision in that case is on the border line and is of doubtful soundness."

The order of the State Tax Commission, which made the assessments final, recites that it was made after "an exhaustive and diligent examination of all available information." It adjudicated and determined that the income from one-half of the four per cent (½ of 4%) paid by the lessees was royalty for manufacturing patented boxes and was not taxable; but that the other half was for rent and was taxable; and that all of the income from the two per cent (2%) charge for making unpatented boxes was rental, and was taxable. The basis for the assessments was sound in fact, and was in no way arbitrary or discriminatory.

It follows that the learned trial court was in error in awarding a judgment for the appellee, and the cause is, therefore, reversed, and a judgment will be entered here for the appellant.

Reversed and judgment here.

All Justices Concur.

APPENDIX "B"

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS, COUNTY, MISSISSIPPI

No. 13,056

STAPLING MACHINES CO.

v.

A. H. STONE, Chairman State Tax Commission

WRITTEN RULING OF THE CIRCUIT JUDGE

The Tax Commission exacted the sum of $11,730.42 from the plaintiff, the Stapling Machines Company under the two percent sales tax levied upon what it termed taxable rental contracts made in this State. The Stapling Machines Company, plaintiff, sued for recovery and the rights of action of the Company are tantamount to its defenses against the tax.

From the pleadings and the admission contained therein it appears to me that the entire transaction is in Interstate Commerce. The Stapling Machines Company is domiciled in New Jersey. That is where this contract is made, call it what you may. Sales tax is essentially a privilege upon doing business. It differs essentially and vitally from the franchise tax. It is a tax upon a transaction if and when and where it takes place. If this were a tax upon a rental contract the tax would immediately attach when the rental contract is made, then and there. Without doubt, this con-

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tract was made in New Jersey. A sum of money, which is said in the pleading to be equal to the value of the machines, was paid. It is not further designated. Then thereafter certain other sums were paid, I will revert to this later. But there seems to be no differentiation between the sums paid monthly and the amounts initially paid; that which is called the value of the machine is rent, if anything.

I do not see how the rental money, if such it is, could be split, and the part paid in New Jersey tax free, and the part paid monthly from Mississippi, sent there by mail, would be taxable.

This defense of the transaction, being violative of Commerce Clause of the United States Constitution, is a total defense, and if good, would, of course, bar the tax and warrant the recovery.

There is another reason why I do not believe the tax is warranted. In order to sustain such a tax there must be a positive, valid and legal assessment. I do not think the assessment is in any sense valid in this case. It attempts to separate the sums of money collected by the machine owners as royalty.

It is to be recalled that the machines were patented machines and also that they made, predominantly, patented boxes. We have a situation here of a patented machine making a patented product. The recompense of the Stapling Machines Company was purely a 4 percent royalty, which does not appear on its face to be unreasonable, and there is no proof or allegation in the record any where which challenges the reasonableness of this royalty charge.

The Tax Commission, by some process that cannot be designated otherwise than as purely arbitrary, attempted to set up half of this royalty as rental and leave the other half proportioned to royalty. This they were without authority to do, especially in the absence of proof or allegation warranting the same.

The four percent royalty is clearly not taxable under our privilege or sales tax, but would be taxable at the situs of the patent as income tax.

Therefore, I would rule, unquestionably, that the assessment being based upon such an arbitrary action of the Com-

mission in attempting to separate these royalties without any reasonable grounds or justification, is void.

It follows that since the assessment is void, the tax collection was void in its entirety, and that this alone would give the taxpayer an additional right to recover.

Neither the pleadings nor the record in the case disclose at any place what percentage of the tax collected was attributable to the fifty percent split-off of the four percent royalty from the patented boxes. However, it was freely admitted in the argument that about 95 percent of the income from the machines was derivable from this source, that is the four percent of same from royalty or rentals, or whatever you call it from the manufacture of non-patented boxes. This vital matter of proof is indistinct so far as allegations and proof are concerned. In fact, there is no stipulation in the record and no transcript of any record of the hearing before the commission. We can only take the assessment as we find it as implemented by the pleadings of the Commission and admitted pleadings of the plaintiff in the suit.

Plaintiff, taxpayer, contends that all of its income is royalty, even the two percent on nonpatented boxes is royalty. I do not find it necessary to pass upon this particular subject, as I believe that both of the defenses to the tax set out above are competent and total defenses. The first is that the tax is a burden upon interstate commerce, and, second, that it is a void assessment.

Therefore, judgment of the Court will be for the plaintiff, that he recover the sum sued for.

M. M. McGowan,
Circuit Judge.

APPENDIX "C"

CHAPTER 119, LAWS OF 1934 AS AMENDED BY MISSISSIPPI CODE OF 1942 (RECOMPILED), CHAPTER 3, SECTIONS 10,105, 10,111, 10,115, 10,120, 10,121 AND 10,123

10,105. Tax levied.—There is hereby levied and shall be collected annual privilege taxes, measured by the amount or volume of business done, against the persons, on account of the business activities, and in the amounts to be determined by the application of rates against values, or gross income, or gross proceedings of sales, as the case may be, as follows:

10,111. Miscellaneous business.—(1) Upon every person engaging or continuing within this state in any of the following businesses, there is likewise hereby levied and shall be collected a tax on account of the business engaged in equal to two per cent of the gross income of the business:

Renting or leasing of tangible personal property

10,115. Permit to engage in business.—Any person who engages, or who intends to engage, in any business or activity which will subject such person to a privilege tax imposed by this act, shall apply to the commissioner for a permit to engage in and to conduct any business or activity upon the condition that he shall pay the tax according to the State of Mississippi under the provisions of this act; and shall keep adequate records of such business or activity as required by section 8 (Sec. 10120) of this act. Upon receipt of such permit, the applicant shall be duly licensed under this act to engage in and conduct such business or activity. Said permit shall continue in the same business at the same location, unless revoked by the commissioner for cause.

The commissioner is hereby authorized to revoke the permit of any person failing to comply with any of the provisions of this act, after giving to the person holding such permit ten (10) days' notice of the intention of the commissioner to revoke such license. Unless good cause

be shown within said ten (10) days why such permit should not be revoked, the commissioner may revoke such permit, and revocation of such permit, or engaging or continuing in business after such permit is revoked, shall subject such person to all the penalties imposed by section 16 (10133) of this act.

Any person liable for a tax under the provisions of this act who fails to obtain a permit from the commissioner or who continues in business after such permit has been revoked, or who fails to make his returns for taxation as provided in section 6 (10118) of this act, or who fails to keep adequate records and invoices provided by section 8 (10120) of this act, or who fails or refuses to permit inspection of such records, or who fails to pay any taxes due hereunder, shall forfeit his rights to do business in this state until he complies with all the provisions of this act and until he enters into a bond, with sureties, to be approved by the Commissioner, in an amount not to exceed twice the amount of all taxes estimated to become due under this act by said person for any three (3) month period, conditioned to comply with the provisions of this act, and pay all taxes legally due by him.

The commissioner shall require of every person desiring to engage in business within this state, who maintains no permanent place of business within the state, a cash bond or an approved surety bond in an amount sufficient to cover twice the estimated tax liability for a period of three (3) months. Provided, however, that the bond shall in no case be less than one hundred dollars ($100.00) and that the tax may be prepaid in lieu of filing bond if the amount is approved by the commissioner. This bond shall be filed with the commissioner prior to the issuance of a permit to do business and before any such person may engage in business within this state. Failure to comply with this provision will subject such person to the penalties provided by section 16 (10133) of this act.

If any person is engaged in or continuing in this state in any business or activity without obtaining a permit, or after such permit has been revoked, or without filing a required bond, or without keeping and allowing inspection

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of all records required by this act, or without making a return, or returns, and without paying all taxes due by him hereunder, it shall be the duty of the commissioner, or the attorney general when requested by the commissioner, to proceed by injunction to prevent the continuance of said business. Any temporary injunction enjoining the continuance of such business shall be granted without notice by a judge or chancellor now authorized to grant injunctions.

10,120. Taxpayer must keep records.—It shall be the duty of every person taxable under this act to keep and preserve for a period of three (3) years adequate records of the gross income, gross receipts or gross proceeds of sales of the business, including all invoices of merchandise purchased, all bank statements and cancelled checks, and all other books or accounts as may be necessary to determine the amount of tax for which he is liable. Said records shall be adequate in substance to conform with the provisions of this act and the regulations promulgated by the commissioner, and all of such records shall be written in the English language. All records shall be open for examination at any time, by the commissioner or his duly authorized agent.

The records provided for in this section shall be kept at the taxpayer's principal place of business within this state, and failure to keep and allow examination of such records shall subject the taxpayer to all the penalties of section 16 (10133) of this act.

10,121. Assessment of tax; Failure to file return.—(a) Assessment of Tax. If adequate records of the gross income or gross proceeds of sales are not maintained or invoices preserved as provided herein or if an audit of the records of a taxpayer discloses that additional taxes are due and unpaid, the commissioner may make additional returns and assessments from the best information available, and shall give notice by registered mail of such returns and assessments, and such returns and assessments shall be prima facie correct for purposes of this act. The amount of tax, penalty, and interest, shown due thereby, shall be a lien against all the property of the taxpayer until discharged

by payment. If such tax is paid within ten (10) days after notice by the commissioner, then there shall be added ten per cent (10%) as damages for the first offense, twenty-five per cent (25%) for the second offense and fifty per cent (50%) for any subsequent offense, and interest at the rate of one per cent (1%) per month, or part of a month of the tax from the time such tax was due until paid. If payment is not made within ten (10) days after demand thereof by the commissioner, there shall be added as damages twenty-five per cent (25%) for the first offense and fifty per cent (50%) for subsequent offenses together with interest at the rate of one per cent (1%) per month or part of a month of the tax from such time such tax was due until paid. Provided, however, in the event the taxpayer, within ten (10) days from the date of the notice, shall by petition in writing state that said return is incorrect, the commissioner shall grant a hearing on the petition and investigate that question fully before proceeding further under this section.

(b) Failure to file a return. If no return is made by any taxpayer required to make returns as provided herein, the commissioner shall give written notice by registered mail to such taxpayer to make such returns within ten (10) days from the date of such notice, and if the taxpayer shall fail or refuse to make the returns as he may be required to make in the notice, the returns shall be made by the commissioner from the best information available, and the returns shall be prima facie correct for the purposes of this act. The amount of tax, penalty, and interest, shown due thereby, shall be a lien against all the property of the taxpayer from the date the amount thereof is determined to be due until discharged by payment. If the tax is paid within ten (10) days after notice by the commissioner, then there shall be added ten per cent (10%) as damages for the first offense, twenty-five per cent (25%) for the second offense, and fifty per cent (50%) for any subsequent offense, and interest at the rate of one per cent (1%) per month or part of a month on the tax from the time the tax was due until paid. If payment is not made within ten (10) days after demand therefor by the commissioner, there shall be added twenty-five per cent (25%) for the first offense and

fifty per cent (50%) for subsequent offenses, as damages together with interest at the rate of one per cent (1%) per month or part of a month of the tax from the time the tax was due until paid. Provided, however, in the event the taxpayer in answer to the notice from the commissioner shall state by petition in writing that he is not required under the law to make the returns, the commissioner shall grant a hearing on the petition and investigate that question fully before proceeding further under this section.

10,123. Rights of taxpayer.—If any person feels aggrieved by an assessment for taxes made upon him for any year by the commissioner, he may apply to the tax commission by petition, in writing, within ten (10) days after notice is mailed to him, for a hearing and a correction of the amount of the tax assessed upon him by the commissioner, in which petition he shall set forth the reasons such hearing should be granted and the amount in which such tax should be reduced. The tax commission shall promptly consider the petition, grant the hearing, and notify the petitioner of the time and place fixed for the hearing. After the hearing, the tax commission may make such order in the matter as may appear to it just and lawful, and shall furnish a copy of the order to the petitioner. If the tax commission orders the payment of the tax, the taxpayer shall pay the tax, penalties, interest, if any, within ten (10) days after the order is issued. Interest shall accrue on delinquent tax at the rate of one per cent (1%) per month or part of a month from and after the expiration of the ten (10) days period if not paid by that time.

Any person improperly charged with any tax imposed by this act, and required to pay the same, may recover the amount paid together with interest, in any proper action or suit against the commissioner for the amount paid into the State Treasury, or to a representative of any municipality or county which has received any part of the tax sought to be recovered; and the circuit court of Hinds County, or of the county of the taxpayer's residence or place of business, shall have original jurisdiction of any action to recover any tax improperly collected by the commissioner, and paid into any fund in the state treasury or to any

municipality, county or other taxing authority which benefits by said tax.

In any such suit, the plaintiff must allege and prove that he alone bore the burden of the tax sued for, and did not directly or indirectly collect the tax from his customers. It is the declared purpose of this section to make certain that any taxes refunded will go to the person who has borne the burden of the illegal tax, and therefore is entitled in justice and good conscience to such relief, and is therefore the real party in interest. It shall not be necessary for the taxpayer to protest against the payment of the tax or to make any demand to have the same refunded in order to maintain such suit. In any suit to recover taxes paid or to collect taxes, the court shall adjudge costs to such extent and in such manner as may be deemed equitable.

All suits to recover taxes under this act shall be filed within three years from the time the return was filed or from the time the assessment was made.

Either party to a suit shall have the right to appeal to the supreme court of Mississippi as now provided by law. In the event a final judgment is rendered in favor of the taxpayer in a suit to recover illegal taxes, it shall be the duty of the state auditor upon receipt of a certified copy of the final judgment to issue a warrant directed to the state treasurer, in favor of the taxpayer, to pay the part of the illegal tax as was paid into the state treasury, and to certify to the treasurer of any municipality, county or other taxing authority as to the amount of the illegal taxes paid to such municipality, county or other taxing authority, having received any part of the illegal tax, is required hereby to refund the amount of such taxes certified by the auditor, included in the amount for which the judgment was rendered in favor of the taxpayer.

If any municipality, county or other taxing authority, having received any part of the taxes for the recovery of which such judgment is rendered, is unable, unwilling or otherwise fails or refuses to make refund of the amount certified by the state auditor to be due such taxpayer, then the commissioner is hereby authorized to withhold from

such municipality, county or other taxing authority, sufficient funds from any subsequent amount which may be due to such municipality, county or other taxing authority to cover the amount not refunded to the taxpayer. Any such amount so withheld shall be paid into the state treasury and a warrant issued by the state auditor against such fund in payment of the balance due under the judgment rendered in favor of the taxpayer for such taxes.

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